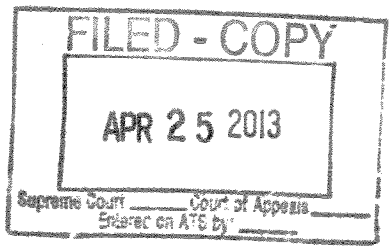
4-25-2013

Jimenez v. State Appellant's Brief Dckt. 40109

IN THE SUPREME COURT OF THE STATE OF IDAHO

JUAN ANTHONY JIMENEZ, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent-Respondent.	)	No. 40109-2012 District Court No. CV-2010-11936 (Canyon County)



OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Third
Judicial District of the State of Idaho
In and For the County of Canyon

HONORABLE JAMES C. MORFITT
District Judge

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II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the district court's judgment dismissing Mr. Juan Anthony Jimenez's petition for post-conviction relief without an evidentiary hearing.

B. General Course of Proceedings

1. Underlying criminal proceedings

The evening of September 9, 2007, witnesses observed men arguing in a Caldwell Maverick store. R. Vol. 2, p. 158[1] (p. 147, ln. 2-9); p. 171 (p. 200, ln. 1-15). Witnesses then observed Mr. Jimenez push another person, later identified as Jay Voshall, into a sunglass display and then leave the store with another man. *Id.* at p. 158 (p. 147, ln. 16-20; 148, ln. 1-9); p. 162 (p. 164, ln. 18-21); p. 166 (p. 180, ln. 2-7); p. 172 (p. 201, ln. 12 - p. 202, ln. 9). Witnesses thought they had just observed shoving match and nobody observed a knife. *Id.* at p. 158 (p. 148, ln. 10-19); p.161 (p. 157, ln. 19-24; p. 160, ln. 23-25); p. 167 (p. 183, ln. 17-18); p. 175 (p. 214, ln. 6-15); p. 176 (p. 218, ln. 1-4). However, Mr. Voshall indicated he had been stabbed. *Id.* at p. 158 (p. 148, ln. 10-19); p. 166 (p. 180, ln. 8-12). Witnesses then called 911 and reported the license plate of the vehicle in which Mr. Jimenez and the other man had been seen getting into. *Id.* at p. 159 (p. 149, ln. 1-20).

Police located a vehicle matching the reported description, initiated a traffic stop and arrested the vehicle's occupants, including Mr. Jimenez. *Id.* at p. 194 (p. 289, ln. 10 - p. 291, ln. 17). At the police station, an officer noticed red stains on Mr. Jimenez's shoes. *Id.* at p. 198 (p.

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[1] The jury trial transcript is included in the record on appeal. Citations include both the page number in the record and the page and line numbers in the transcript.

308, ln. 9-17). Testing showed this blood was human blood but no testing was completed to discover whether the blood belonged to Mr. Voshall. *Id.* at p. 227 (p. 424, ln. 3-8); p. 229-230 (p. 432, ln. 25 - p. 433, ln. 11; p. 434, ln. 7-15). Moreover, police did not notice any stains on Mr. Jimenez's shirt, pants or hands and no weapons or visible blood were found inside the vehicle . *Id.* at p. 201 (p. 317, ln. 22 - p. 318, ln. 3); p. 203 (p. 328, ln. 16-18); p. 221 (p. 397, ln. 7-12); p. 221 (p. 398, ln. 20 - p. 399, ln. 1). Police found a folding knife with human blood 21.9 feet off the road a short distance from the Maverick. *Id.* at p. 204 (p. 329, ln. 4-9); p. 205 (p. 334, ln. 3- 335, ln. 17).

Mr. Jimenez informed his trial attorney that the blood on his shoes was from a fight with an individual named Xavier and did not come from Mr. Voshall. R. p. 13-14, p. 53. Trial counsel nevertheless did not contact Xavier or consider DNA testing or other testing such as blood group or type to exclude Mr. Voshall as the source of the blood. R. p. 362, ¶ 9(b)(viii); p. 366, ¶9; 366, ¶10. Counsel also did not arrange for Mr. Jimenez to view the store surveillance video introduced into evidence at trial in a conference room and instead required him view that video through glass. R. p. 362, ¶ 9(b)(iii); p. 366, ¶ 12.

At trial, Mr. Jimenez explained that he had gone inside the Maverick with his friend intending to get something to eat but his friend then got into a fistfight with Mr. Voshall. R. p. 233 (p. 446, ln. 11 - p. 447, ln. 2). Mr. Jimenez testified that he pushed Mr. Voshall but that he did not have a knife and did not stab Mr. Voshall. *Id.* at p. 448, ln. 10-25. During cross-examination, the State asked Mr. Jimenez several specific questions about the video which he was unable to answer because his vision is poor. R. p. 237 (p. 461, ln. 21 - p. 462, ln. 1; p. 463, ln. 22 - p. 464, ln. 16); p. 238 (p. 467, ln. 19-22; 468, ln. 4-24); p. 239 (p. 471, ln. 14 - p. 472, ln.

14).

During closing argument, the State admitted its case was one of circumstantial evidence because no one saw Mr. Jimenez with a knife but urged that a combination of the various pieces of the puzzle, including the blood on the shoes, demonstrated that Mr. Jimenez was guilty. R. Vol. 2 p. 283 (p. 10, ln. 4 - p. 12, ln. 18); p. 284 (p. 15, ln. 11 - p. 16, ln. 5). The State repeatedly argued that the blood being on the top of Mr. Jimenez's shoes was consistent with the stabbing. *Id.* at p. 283 (p. 12, 22-25); p. 284 (p. 14, ln. 25 - p. 15, ln. 10; p. 15, ln. 13-24); p. 287 (p. 26, ln. 1-14); p. 289 (p. 34, ln. 6-10); p. 290 (p. 40, ln. 10-13). The jury found Mr. Jimenez guilty of aggravated battery. *Id.* at p. 291 (p. 44, ln. 3-16). The district court sentenced Mr. Jimenez to a unified term of fifteen years with a minimum period of confinement of nine years. Id. at p. 343 (p. 63, ln. 1-10).

2. Post-conviction proceedings

On November 8, 2010, Mr. Jimenez filed a pro se petition and affidavit for post-conviction relief. R. Vol. 1, p. 4 - 57. The district court granted Mr. Jimenez's request for counsel and counsel amended the petition for post-conviction relief. R. Vol. 1, p. 95; R. Vol. 3, p. 360 - 367. Mr. Jimenez raised several claims including that counsel was ineffective for refusing to consider DNA testing on his shoes upon request; counsel failed to adequately show the surveillance video evidence to him before trial; failed to prepare Mr. Jimenez for cross-examination, and failed to request a lesser-included instruction or verdict form for simple battery. *Id.* After the State answered, Mr. Jimenez filed a motion requesting DNA testing of the blood on Mr. Jimenez's shoes and Mr. Voshall's shirt, which was denied following hearing on September 21, 2011. R. Vol. 3, p. 384-89; p. 392-95.

On October 11, 2011, the State moved to dismiss the petition for post-conviction relief. *Id.* at p. 400- 419. The district court granted the State's motion to dismiss. *Id.* at p. 483. The district court thereafter entered final judgment in favor of the State and dismissing Mr. Jimenez's post-conviction claims. *Id.* at p. 485-86. This appeal follows.

III. ISSUES PRESENTED ON APPEAL

1. Did the district court err in denying Mr. Jimenez's motion for DNA testing?

2. Did the district court err in summarily dismissing Mr. Jimenez's petition for post-conviction relief?

IV. ARGUMENT

A. The District Court Erred in Denying Mr. Jimenez's Motion For DNA Testing by Concluding That it Could Only Authorize Funding For DNA Testing if He Met I.C. § 19-4902's Specific DNA Testing Requirements, Even Where the Test Was Requested to Support a Claim of Ineffective Assistance of Counsel That Was Presented in a Petition Timely Filed Under Section 19-4902(a)

1. Facts in support of argument

Mr. Jimenez informed his trial attorney that the blood on his shoes was from a fight with an individual named Xavier and did not come from Mr. Voshall. R. Vol. 1, p. 13-14, 53. Trial counsel nevertheless did not contact Xavier or consider DNA testing or other testing such as blood group or type. R. Vol. 3, p. 362, ¶ 9(b)(viii); p. 366, ¶9; p. 366, ¶10. As a result, the State introduced the shoes into evidence at Mr. Jimenez's trial and argued to the jury that the blood came from Mr. Voshall. *See* R. Vol. 2, p. 212 (p. 361, ln. 2-11); p. 283 (p. 12, 22-25); p. 284 (p. 14, ln. 25 - p. 15, ln. 10; p. 15, ln. 13-24); p. 287 (p. 26, ln. 1-14); p. 289 (p. 34, ln. 6-10); p. 290 (p. 40, ln. 10-13).

In his post-conviction relief petition, Mr. Jimenez alleged that counsel was ineffective for

refusing to interview Xavier or request further testing of the blood on the shoes. R. Vol. 3, p. 362, ¶ 9(b)(viii); p. 366, ¶9; p. 366, ¶10. To support this claim, Mr. Jimenez filed a motion seeking DNA testing of the blood found on his shoes and Mr. Voshall's shirt. *Id.* at p. 384-88. Mr. Jimenez explained that the identity of the stabber was an issue at the trial because the alleged victim did not testify, the other witnesses did not see a knife, and there was evidence of another male hitting or fighting with the alleged victim immediately before the witnesses saw Mr. Jimenez push the victim. *Id.* at p. 385. Further, the prosecution used evidence of blood spots on Mr. Jimenez's shoes to suggest that he was the individual that actually stabbed the victim. *Id.*

Mr. Jimenez further explained that law enforcement still had possession of swabs from the blood spots on Mr. Jimenez's shoes and Mr. Voshall's blood stained shirt, which could be delivered to the Idaho State Forensic Services laboratory for testing. *Id.* The State opposed the motion arguing that Mr. Jimenez's case did not meet the specific requirements for DNA testing under I.C. § 19-4902(b).

At the hearing on Mr. Jimenez's motion, he explained that he was not relying on the specific DNA provisions pursuant to Section 19-4902 to support his request and, instead, was relying on the "generic section for public defenders and funding." Tr. Vol. 4, p. 1, ln. 15 - p. 2, ln. 6. Mr. Jimenez also clarified that he was not seeking to test the blood found on Mr. Jimenez's shoes against Xavier but, rather, to compare the blood on the shoes against Mr. Voshall's. *Id.* at p. 2, ln. 16 - p. 3, ln. 12. Mr. Jimenez noted that the State argued to the jury that the blood on the shoes was from the victim and the ability to refute that inference could have changed the outcome of his trial where no witnesses saw a knife and there was another individual who could have stabbed Mr. Voshall. *See id.* at p. 10, ln. 4 - 11, ln. 7. The district court questioned whether the

testimony concerning the blood on the shoes could have been challenged on direct appeal[2] and counsel clarified that Mr. Jimenez complained that he was not provided time to "actually work with his defense counsel to get ready for trial and that's another reason . . . the DNA testing wasn't done." *Id.* at p. 11, ln. 8 - p. 12, ln. 1. The district court inquired whether Mr. Jimenez had authority that I.C. § 19-861 applied rather than I.C. § 19-4902 and Mr. Jimenez conceded Section 4902 was:

> much more specific when it comes to post-conviction relief. But I'm in a situation here where I would like to get this testing done, and . . . I was thinking that the more general section about public defender[s] might provided some basis for letting you give us the authority to send this evidence to the lab.
>
> We know the evidence exists. It's right over here at the Caldwell Police Department, and we just want to send it the Meridian to the Sate lab. We just don't have the money or the wherewithal to do it ourselves.

Id. at p. 12, ln. 5-15.

The district court concluded that the requirements of the Post-Conviction Act applied rather than the more general statements in I.C. § 19-861. *Id.* at p. 12, ln. 21-25. The district court found that Mr. Jimenez did not meet Section 19-4902's requirements, including that the technology was available at the time of trial. The district court noted the typical DNA testing case involves a rape or homicide where the testing could exclude the defendant as the perpetrator and that it "sounds like you're kind of on a fishing trip." *Id.* at p. 14, ln. 1-7. The district court concluded that:

> to allow the testing, the court must find that the result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent and that the testing

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[2] Since trial counsel did not object to this evidence, the issue could not have been raised on direct appeal.

method requested would likely produce admissible results under the Idaho rules of evidence.

Id. at p. 14,14-22; *see also* I.C. § 19-4902. The district court thus denied the motion. *Id.* at p. 14, ln. 23-25.

2. Why relief should be granted

The specific requirements for DNA testing set forth in I.C. § 19-4902 provide an exception to the statute of limitations when new scientific evidence could establish a defendant's innocence. Those requirements do not preclude the court from ordering testing at county expense for an indigent petitioner in order to obtain evidence to support a claim of ineffective assistance of counsel, set forth in a timely filed post-conviction relief. Instead, Mr. Jimenez's request was governed by the same authority that provides for the assistance of counsel in post-conviction proceedings and should have been treated as an request for discovery.

Because the district court did not apply the applicable legal standards in denying Mr. Jimenez's request for DNA testing, it abused its discretion in denying his motion to have the blood on his shoes tested against the blood on Mr. Voshall's shirt. Moreover, the DNA testing was necessary to protect Mr. Jimenez's substantial rights and, therefore, Mr. Jimenez was harmed by the district court's erroneous conclusion that he was required to meet I.C. § 19-4902's requirements before funding for that testing could be authorized.

a. Section 19-4902 provides an exception to the statute of limitations when previously unavailable fingerprint or DNA testing would show a petitioner's innocence and does not apply to a request for DNA testing to support a claim of ineffective assistance of counsel

The post-conviction relief statute provides for two methods of initiating a post-conviction action. First, a petitioner may commence a proceeding by filing a verified application "at any time

within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever is later." I.C. § 19-4902(a). Second:

> a petitioner may, *at any time*, file a petition . . . for the performance of fingerprint or [DNA] testing on evidence that was secured in relation to the trial which resulted in his or her conviction but which was not subject to the testing that is now requested because the technology for the testing was not available at the time of trial.

I.C. § 19-4902(b). (emphasis added). Subsections (c) through (e) then set forth the specific requirements that must be met to file a petition pursuant to subsection (b), including that "the result of the testing has the scientific potential to produce new, noncumulative evidence that would show that it is more probable than not that the petitioner is innocent." I.C. § 19-4902(c) - (e). "The cost of the forensic DNA test shall be at the petitioner's expense, except to the extent the petitioner qualifies for the test at public expense pursuant to chapter 8, title 19, Idaho Code." I.C. § 19-4902(g).

Mr. Jimenez requested funding for DNA testing to compare the blood on his shoes with the blood on Mr. Voshall's shirt to support his claim that trial counsel was ineffective for failing to secure that testing at his request. Mr. Jimenez filed his post-conviction relief petition within the time limit set forth pursuant to Section 19-4902(a) and he was not required to meet the strict requirements for a petition filed under subsection (b) before being entitled to that testing. Indeed, a claim of ineffective assistance of counsel is mutually exclusive with a subsection (b) petition, since counsel could not possibly be deficient for failing to request a test that was not available at the time of trial. Accordingly, the district court erred in concluding that it could not authorize the requested testing unless Mr. Jimenez met the requirements for DNA testing in I.C. § 19-4902.

b. Mr. Jimenez's request was one for discovery and he was entitled to have the court order payment of costs to protect his substantial rights as part of his right to post-conviction counsel

Mr. Jimenez argued that the specific DNA provisions pursuant to Section 19-4902 did not apply to his motion and that his request was instead grounded on the "generic section for public defenders and funding." Tr. Vol. 4, p. 1, ln. 15 - p. 2, ln. 6. Mr. Jimenez specifically cited to I.C. § 19-861(c), which provides that: "a defending attorney is entitled to use the same state facilities for the evaluation of evidence as are available to the county prosecutor." The district court inquired whether that section only applied in circumstances where an "office of public defender has been established" [I.C. § 19-861(a) & (b)] and, in any event, concluded the specific provisions of I.C. § 19-4902 controlled. Tr. Vol. 4, p. 11, ln. 8-18; p. 12, ln. 21-25.

Initially, while Sections 19-861(a) and (b) utilize the phrase "office of public defender," subsection (c) refers to a "defending attorney," which plainly has a broader application than the specific reference to "office of public defender." Indeed, while that term is not specifically defined in the existing code, it is defined in the amended version that will be effective July 2013 as "any attorney employed by the office of public defender, contracted by the county or otherwise assigned to represent adults or juveniles at public expense." 2013 Idaho Laws Ch. 220 (H.B. 147). As a contract public defender, Mr. Jimenez's post-conviction attorney was entitled to evaluate evidence in the same manner as the prosecutor.

Regardless of whether a defending attorney in a post-conviction action[3] has the right to use the same state facilities as the State for evaluation of evidence, Mr. Jimenez correctly argued that the general right to a public defender provided the district court with authority to order the DNA testing. Pursuant to I.C. § 19-4904, the district court may order the county to pay "court costs and expenses of representation" when the applicant is unable to afford those costs and expenses. A request under I.C. § 19–4904 for funds to retain an expert may be viewed as analogous to a request for discovery in a post-conviction action. *Murphy v. State*, 143 Idaho 139, 148, 139 P.3d 741, 750 (Ct. App. 2006). A post-conviction petitioner who believes discovery is necessary for acquisition of evidence to support a claim for post-conviction relief must obtain authorization from the court to conduct discovery. I.C.R. 57(b); *Raudebaugh v. State*, 135 Idaho 602, 605, 21 P.3d 924, 927 (2001); *Murphy*, 143 Idaho at 148, 139 P.3d at 750.

Whether to authorize discovery is a matter directed to the discretion of the trial court. I.C.R. 57(b); *Murphy*, 143 Idaho at 148, 139 P.3d at 750; *Aeschliman v. State*, 132 Idaho 397, 402, 973 P.2d 749, 754 (Ct. App. 1999). The district court is required to order discovery when it is "necessary to protect an applicant's substantial rights." *Murphy*, 143 Idaho at 148, 139 P.3d at 750; *Griffith v. State*, 121 Idaho 371, 375, 825 P.2d 94, 98 (Ct. App. 1992).

Here, the district court believed that it lacked the authority to order the DNA testing unless

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[3] Appointment of counsel in post-conviction proceedings is governed by I.C. § 19-4904 instead of by I.C. § 19-582. I.C. § 19-853(b), amended by 2013 Idaho Laws Ch. 220 (H.B. 147) ("appointment of an attorney at public expense in uniform post-conviction procedure act proceedings shall be in accordance with section 19-4904, Idaho Code"; *Charboneau v. State*, 140 Idaho 789, 792 n.1, 102 P.3d 1108, 1111 n.1 (2004). It is less clear whether a defending attorney appointed under Section 19-4904 could use state facilities under Section 19-861.

the specific requirements in Section 19-4902 were met. Accordingly, it abused its discretion in denying Mr. Jimenez's motion because it failed to perceive the issue as discretionary and failed to act consistently with the applicable legal standards. *See Eby v. State*, 148 Idaho 731, 734, 228 P.3d 998, 1001 (2010) (describing abuse of discretion standard of review).

Moreover, the State relied on the ability to infer that the blood on Mr. Jimenez's shoes came from Mr. Voshall to provide an important piece of the circumstantial evidence puzzle that led the jury to convict. The ability to test the DNA of the blood on the shoes against the blood on Mr. Voshall's shirt was an essential part of establishing Mr. Jimenez's claim of ineffective assistance of counsel for failing to obtain that testing. Accordingly, the testing was necessary to protect Mr. Jimenez's substantial rights and the district court should have authorized that testing.

The UPCA provides a forum for known grievances, not an opportunity to research for grievances and, thus, a post-conviction action is not a vehicle for unrestrained testing or retesting of physical evidence introduced at the criminal trial. *Murphy*, 143 Idaho at 148, 139 P.3d at 750. However, unlike a fishing expedition, Mr. Jimenez had a very specific complaint and request. The district court presumed true Mr. Jimenez's averments that he told trial counsel that the blood on his shoes came from a fight with Xavier, which had occurred earlier on the day of the crime charged. R. Vol. 3, p. 466. Despite Mr. Jimenez's request, trial counsel refused to consider DNA testing on the shoes. The requested DNA testing would have excluded[4] Mr. Voshall as the source of the blood on Mr. Jimenez's shoes and, thus, precluded the State from arguing that the blood

[4] While subsequent information is not relevant in this appeal, it is worth noting that Mr. Jimenez was able to secure testing of the shoes and Mr. Voshall's shirt in defending a federal criminal action in which this case was alleged as a predicate act. The FBI laboratory excluded Mr. Voshall as a potential contributor to the DNA found on the shoes.

supported Mr. Jimenez's guilt.

While DNA testing under Section 19-4902 can only be authorized if likely to show the defendant's innocence, post-conviction discovery need only yield "exculpatory evidence." *See Murphy*, 143 Idaho at 148, 139 P.3d at 750. Because trial counsel failed to request the testing, the State was allowed to introduce the shoes into evidence and strenuously argue that the blood supported Mr. Jimenez's guilt. Therefore, there is a reasonable probability that preventing the State from arguing that the blood on Mr. Jimenez's shoes came from Mr. Voshall would have changed the outcome of the trial.

In closing argument, the State admitted it did not have direct evidence that Mr. Jimenez stabbed Mr. Voshall and instead urged that the other evidence combined suggested Mr. Jimenez was guilty. R. Vol. 2 p. 283 (p. 10, ln. 4 - p. 12, ln. 18). In addition to the push and the knife found along side the road with blood, the State argued "Blood on Juan's shoes; not the bottom of the shoes, the tops of his shoes. There was testimony from the officers didn't observe any blood coming from Juan when he was arrested. That just adds to it." *Id.* (p. 12, 22-25). Later, the prosecutor argued that it made sense that Mr. Voshall would have bled on Mr. Jimenez's shoes instead of his shirt. *Id.* at p. 284 (p. 14, ln. 25 - p. 15, ln. 10). The prosecutor told the jury that when Mr. Voshall:

> bends over, being stabbed through two shirts, I would argue the only place for blood to exit immediately would be in a downward direction. And the blood is on top of Juan's shoes, not on the bottoms, not on the treads. It's on the top.
>
> Why wasn't there any blood on his pants. I would argue the same reasons for that.
>
> Why wasn't there any blood in the car when the officer searched the car? The blood was on top of Juan's shoes. It wasn't on the bottom of his shoes.

Id. (p. 15, ln. 13-24). The prosecutor asked the jury to "carefully review all of the evidence . . . look at the shoes, look at the knife, look at the photos, watch the video, study it." *Id.* at p. 285 (p. 17, ln. 17-25).

In Mr. Jimenez's closing argument, defense counsel argued the blood on Mr. Jimenez's shoes could have come from someone other than Mr. Voshall or could have come from Mr. Voshall's bloody nose. *Id.* at p. 287 (p. 26, ln. 1-14). The State rebutted, arguing "how the heck did [the blood] get on Juan's shoes?" *Id.* at p. 289 (p. 34, ln. 6-10). Before closing, the State held the shoes in front of the jury, indicating "the very shoes that [the criminologist] tested. When you look at these, look for the stains. You'll notice they're towards the end of the shoes." *Id.* at p. 290 (p. 40, ln. 10-13).

The State not only introduced the shoes into evidence, it repeatedly relied on the blood to support Mr. Jimenez's guilt in closing argument. Accordingly, DNA testing of those shoes againt the blood on Mr. Voshall's shirt was necessary to protect his substantial right to effective assistance of counsel and the district court erred in denying Mr. Jimenez's motion.

B. The District Court Erred in Summarily Dismissing Mr. Jimenez's Post-Conviction Relief Petition Because He Presented Issues of Material Fact Entitling Him to an Evidentiary Hearing

1. Pertinent legal standards

An application for post-conviction relief initiates a proceeding which is civil in nature. *Sparks v. State,* 140 Idaho 292, 295, 92 P.3d 542, 545 (Ct. App. 2004). Summary dismissal of a post-conviction action, either upon motion of the court or the state, is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle him to the requested relief. *Goodwin v. State,* 138 Idaho 269, 272, 61 P. 3d

626, 629 (Ct. App. 2002). If such a factual issue is presented, an evidentiary hearing must be conducted. *Sparks,* 140 Idaho at 295, 92 P.3d at 545.

On review of a dismissal of a post-conviction relief action without an evidentiary hearing, the appellate court determines whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file. *State v. LePage,* 138 Idaho 803, 807, 69 P.3d 1064, 1068 (Ct. App. 2003). Moreover, the appellate court liberally construes the facts and reasonable inferences in favor of the non-moving party. *Goodwin,* 138 Idaho at 272, 61 P.3d at 629; *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

The right of a criminal defendant to counsel during trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 13 of the Idaho Constitution. *See Gideon v. Wainwright*, 372 U.S. 335, (1963); *Milburn v. State*, 130 Idaho 649, 652, 946 P.2d 71, 74 (Ct. App. 1997). A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Martinez v. State*, 143 Idaho 789, 795, 152 P.3d 1237, 1243 (Ct. App. 2007); *Murray v. State*, 121 Idaho 918, 924-25, 828 P.2d 1323, 1329-30 (Ct. App. 1992). A defendant claiming ineffective assistance of counsel will prevail if he shows that (1) counsel's performance was deficient and, that (2) counsel's deficient performance prejudiced the defendant. *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

A defendant meets the deficiency prong when counsel's performance falls below an objective standard of reasonableness. *Mitchell v. State*, 132 Idaho 274, 277, 971 P.2d 727, 730 (1998); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). As a general matter, this Court will not attempt to second-guess counsel's strategic and tactical choices. *State v. Elison*, 135 Idaho 546, 551, 21 P.3d 483, 488 (2001). Nonetheless, this rule does not apply to

counsel's decisions that are the result of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. *Id.* The prejudice prong is met when the defendant shows that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Aragon,* 114 Idaho at 761, 760 P.2d at 1177; *Mitchell,* 132 Idaho at 277, 971 P.2d at 730.

2. The District Court Erred in Summarily Dismissing Mr. Jimenez's Claim That He Received Ineffective Assistance of Counsel Because Counsel Refused to Request DNA Testing of the Blood Found on Mr. Jimenez's Shoes

Trial counsel performed deficiently in failing to obtain further testing of the blood on Mr. Jimenez's shoes, even after Mr. Jimenez explained that the blood came from a fight with a person named Xavier. Further, such testing would have excluded Mr. Voshall as the source of that blood and, thus, the State would not have been able to rely on that blood to support Mr. Jimenez's alleged guilt. Accordingly, there is a reasonable probability that if the testing had been done, the outcome of the trial would have been different.

Inadequate preparation prior to trial, including the failure to investigate material relied on by the prosecution, may be sufficient to show deprivation of the right to effective assistance of counsel. *Murphy,* 143 Idaho at 145-46, 139 P.3d at 747-48. The district court accepted Mr. Jimenez's allegation that he told trial counsel that the blood on his shoes came from a fight with Xavier, which had occurred earlier on the day of the crime charged. R. Vol. 3, p. 466. Trial counsel nonetheless failed to interview Xavier or to have any further testing conducted on the shoes. This complete lack of investigation was objectively unreasonable where it allowed the State to infer that the blood – which in reality was irrelevant – was a key piece of the circumstantial evidence supporting Mr. Jimenez's guilt.

The district court summarily dismissed this claim in part because the "DNA testing has not been performed" and it was "therefore, impossible to determine what impact DNA testing would have had on the verdict." R. Vol. 3, p. 460; *see also* p. 480 (incorporating findings from pages 460-61). As discussed above, the district court abused its discretion in refusing to authorize this testing and thereby deprived Mr. Jimenez of essential evidence in support of his claim of ineffective assistance of counsel.

The district court also found that the "DNA testing could exclude the victim as being the source of the blood spots on the Petitioner's shoes" but that Mr. Jimenez "has not established the State has DNA samples of the victim would be otherwise available." R. 458-59. This finding ignores post-conviction counsel's affidavit in support of the motion for DNA testing and his arguments in the hearing on that motion. In an affidavit, counsel explained that

> The Caldwell Police Department has in its possession certain pieces of evidence that can be tested to determine if the blood spots on the Petitioner's shoes match with the blood found on the victim's T-shirt, specifically, in connection with Caldwell Police Report No. 07-19198: Item #2 (T-Shirt with blood stain from victim, Jay Voshall); Item #27 (swab of blood sample found on defendant's right shoe); Item #28 (swab of blood sample found on defendant's left shoe).

R. Vol. 3, p. 388. During the hearing, Mr. Jimenez clarified that he was not seeking to test the blood found on Mr. Jimenez's shoes against Xavier but, rather, to compare the blood on the shoes against Mr. Voshall's. Tr. Vol. 4, p. 2, ln. 16 - p. 3, ln. 12. He told the district court that "We know the evidence exists. It's right over here at the Caldwell Police Department, and we just want to send it the Meridian to the Sate lab." *Id.* at p. 2, ln. 5-15.

Mr. Jimenez clearly established that both the blood on the shoes and Mr. Voshall's shirt was available for testing. The district court thus erred in finding that Mr. Jimenez had not

established that Mr. Voshall's blood was available for testing.

Finally, Mr. Jimenez was prejudiced by counsel's failure to request the DNA testing. As set forth in section IV.A(2)(b), the State not only introduced the shoes into evidence but repeatedly argued their significance during closing argument. Absent the ability to infer Mr. Voshall's blood was on Mr. Jimenez's shoes, there is a reasonable probability that the outcome of the trial would have been different. Accordingly, the district court erred in summarily dismissing Mr. Jimenez's claim without ordering the requested DNA testing.

3. The District Court Erred in Summarily Dismissing Mr. Jimenez's Claim That He Received Ineffective Assistance of Counsel Because Counsel Did Not Object to Blood Test Evidence

Mr. Jimenez claimed that counsel was ineffective for failing to object to blood test evidence that showed that the blood found on his shoes was human. R. Vol. 3, p. 363 ¶ 9(c)(iii); p. 367, ¶ 18. In dismissing this claim, the district court found that Mr. Jimenez did not present authority or evidence that certification is required to use the test utilized by the criminologist or that her qualifications were deficient. *Id.* at p. 479.

However, counsel should have objected to the criminologist's testimony as irrelevant and that any relevance was outweighed by the danger of unfair prejudice. To be admissible at trial, evidence must have some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. Without the ability to tie the blood on Mr. Jimenez's shoes to Mr. Voshall, that blood did not make it any more probable that Mr. Jimenez stabbed Mr. Voshall. Trial counsel thus should have moved to exclude the evidence as irrelevant.

Even if marginally relevant, the blood evidence should have been excluded as unduly

prejudicial. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." I.R.E. 403. Any probative value of the blood was minimal where there was no evidence that the blood came from Mr. Voshall. Conversely, the jury was allowed to infer that blood did originate from Mr. Voshall. Such an inference was unfairly prejudicial. Trial counsel therefore should have objected to the evidence under Rule 403.

Mr. Jimenez was prejudiced by counsel's failure to object to the blood evidence because it allowed the State to lead the jury to believe the blood came from Mr. Voshall. The exact nature of that prejudice is set forth above in IV.A(2)(b). The district court therefore erred in summarily dismissing Mr. Jimenez's petition for post-conviction relief.

4. The District Court Erred in Summarily Dismissing Mr. Jimenez's Claim That He Received Ineffective Assistance of Counsel Because Counsel Failed to Prepare Mr. Jimenez For Cross-Examination and Failed to Provide Him With an Opportunity to Adequately View the Surveillance Video

Mr. Jimenez alleged that trial counsel did not prepare him for cross-examination by practicing any questioning or telling him what questions to expect on cross-examination. R. Vol. 3, p. 362 ¶ 9(c)(ii); 366 ¶ 13. Mr. Jimenez also contended that trial counsel did not adequately show him the surveillance video by reserving a conference room and instead showed him the video obscured by a glass partition in the visiting room. R. Vol. 3, p. 362, ¶ 9(b)(iii); p. 366 ¶ 12.

In dismissing this claim, the district court found:

> Petitioner was questioned by his counsel about the events of the evening in question; the questioning was narrowly limited to the matters at issue in the case. Petitioner denied knowing the victim was bleeding when he left the Maverick store; denied having seen a weapon; denied having a weapon; and, denied having stabbed the victim. (Tr. Trans. p. 448, Ln.14 - 25). The scope of Petitioner's cross-examination was limited to the events of the evening that the Petitioner testified to on direct. Petitioner was asked for details about the events of the evening that he had testified about on direct examination. He was not asked any

> trick questions nor was he pressed hard by the State on cross-examination. Petitioner's answers were evasive and he testified that he did not know or did not remember quite a number of details about his activities on the evening of the crime.(Tr. Trans. pp. 452-73). Petitioner has presented no information as to how his counsel could have improved his memory on such things as where they went in Boise, their route of travel to the Maverick store or the description of the house where a girl and her children joined them. Considering the testimony presented, the Court could reasonable infer that the jury could find the Petitioner less than a credible witness.

R. Vol. 3, p. 475-76.

These findings in essence establish why summarily dismissing Mr. Jimenez's claim was in error. Had counsel met with Mr. Jimenez to discuss his testimony and prepared him for the questions the prosecutor might have asked, the details would have been fresher in his mind and he would not have seemed as evasive. Further, many of the prosecutor's questions centered around the video of the store surveillance, which Mr. Jimenez could not view due to his poor vision. R. Vol. 2, p. 237 (p. 461, ln. 21 - p. 462, ln. 1; p. 463, ln. 22 - p. 464, ln. 16); p. 238 (p. 467, ln. 19-22; 468, ln. 4-24); p. 239 (p. 471, ln. 14 - p. 472, ln. 14). A critical part of adequately preparing Mr. Jimenez to testify was allowing him to fully view this critical evidence. Instead, trial counsel only allowed Mr. Jimenez to view the video through a glass partition. Had Mr. Jimenez been able to fully view the video before his testimony, his answers on cross examination would have seemed far less "evasive."

The district court found that Mr. Jimenez failed to allege that he asked his attorney to reserve a conference room or that an attorney room would have been available. However, that a request was made can be inferred from Mr. Jimenez's allegation that counsel did not reserve a room. Further, it is the responsibility of counsel and the detention facilities to ensure adequate facilities to allow clients to review the evidence against them. Denying access to contact visits so

attorneys can review audio and video discovery with criminal defendants would be a deprivation of the effective assistance of counsel.

Trial counsel performed deficiently by failing to prepare Mr. Jimenez for cross-examination and by failing to ensure that Mr. Jimenez had an adequate opportunity to view the video surveillance. Mr. Jimenez was prejudiced by that performance because he was unprepared for the prosecutor's questions on cross-examination and unable to answer questions about the video, which made him seem evasive to the jury. The district court therefore erred in summarily dismissing Mr. Jimenez's post-conviction relief petition.

5. The District Court Erred in Summarily Dismissing Mr. Jimenez's Claim That He Received Ineffective Assistance of Counsel Because Counsel Failed to Request a Lesser Included Instruction

Mr. Jimenez alleged that he received ineffective assistance of counsel because trial counsel did not ask the district court to instruct the jury that it could find him guilty of simple battery. Idaho Code § 19-2132(b) requires the court to instruct on a lesser included offense if: 1) either part requests such instruction; and, 2) there is a reasonable view of the evidence presented that would support a finding that the defendant committed such lesser included offense but did not commit the greater offense. The district court correctly found that a reasonable view of the evidence presented in the underlying criminal case would have supported the giving of an included offense instruction on battery and, thus, it would have been required to give the instruction if it had been requested. R. Vol. 3, p. 477. The district court nevertheless found that:

> whether to request an included offense instruction is a matter of trial strategy and tactics. If the defense believes that the state's evidence is weak, the defense may well not request included offense instructions with the goal of achieving a straight acquittal. Where the state's evidence is stronger, counsel may determine it would be best to request any applicable included offense instructions.

Id.

However, strategic or tactical decisions made by trial counsel will not be second-guessed on review, unless those decisions are made upon a basis of inadequate preparation, ignorance of the law. Further, strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. ABA Criminal Justice Standards Standard 4- 5.2 (b).

Here, the decision to forego a lesser included instruction and verdict was apparently made without discussion with Mr. Jimenez and, thus, was based on inadequate preparation. Further, the State's evidence was such that giving the jury the option finding Mr. Jimenez guilty of a lesser included offense was critical. This is particularly true where Mr. Jimenez's testimony on his own behalf established that he committed a simple battery. There is a reasonable probability that the jury would have acquitted Mr. Jimenez of aggravated battery if given the option to find him guilty of simple battery and, therefore, he was prejudiced by counsel's failure to request such an instruction.

Mr. Jimenez presented an issue of material fact as to whether he received ineffective assistance of counsel by trial counsel's failure to request a lesser included instruction. Therefore, the district court erred in summarily dismissing his petition for post-conviction relief.

V. CONCLUSION

Mr. Jimenez respectfully asks this Court to reverse the district court's judgment dismissing his post-conviction claims and to remand this case for further proceedings.

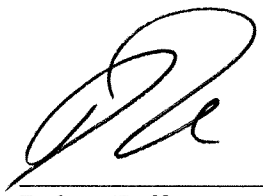
Respectfully submitted this 25 day of April, 2013.

NEVIN, BENJAMIN, McKAY & BARTLETT LLP

Robyn Fyffe
Attorney for Juan Anthony Jimenez

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of April, 2013, I caused two true and correct copies of the foregoing to be mailed to: Office of the Attorney General, P.O. Box 83720, Boise, ID 83720-0010.



Robyn Fyffe